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No. 74-1489

In the Supreme Court of the United States

OCTOBER TERM, 1975

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL., PETITIONERS

v.

DAY AND ZIMMERMAN, INC.,

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The sole question presented by the petition is whether the acquisition of tangible personal property by a private contractor to be used in its performance of a contract with the United States and its transfer of the property to the United States were, respectively, sales for resale and sales to the United States that were exempt from taxation under the Texas Sales, Excise and Use Tax Act.

The pertinent facts are as follows: During the period 1964 through 1968, respondent Day and Zimmerman, Inc., was the operating contractor under a cost plus award fee contract[1] of the Lone Star Army Ammunition Plant in Bowie County, Texas. The plant was a military installation under the command of a military officer and was owned by, and under the jurisdiction of, the United States. Under the contract, respondent was responsible for loading, assembling, and packaging ammunition and its components, as well as handling the mechanics of procurement for all necessary materials, supplies, equipment, and services. Respondent performed these functions under government inspection. It obtained the supplies from the government through the General Services Administration, and from private concerns, some of which held Federal Supply Schedule Contracts[2] (Pet. App. III 22, 24; Stip. pars. 5, 11, 38).[3]

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[1]Under the cost plus award fee contract, the government reimbursed respondent for its operating costs and other materials procured and paid respondent a fee for each item produced and accepted plus an award fee for costs savings, meeting delivery schedules, and safety (Pet. App. III 23).

[2]A Federal Supply Schedule Contract is a government supply contract awarded by the General Services Administration to a manufacturer or supplier covering the government's anticipated requirements for specified property and/or services at established prices. Respondent was permitted to obtain materials from concerns under a Federal Supply Schedule Contract only when title to the property passed to and vested in the government directly from the Federal Supply Schedule contractors. Section 5-903.1, Armed Services Procurement Regulations. Respondent's orders issued to Federal Supply Schedule vendors provided that the title would vest in the United States and that if there was an inconsistency between the Federal Supply Schedule Contract and the order, the Federal Supply Schedule Contract would prevail (Stip. pars. 41, 42).

[3]"Stip." refers to the stipulation of facts by the parties.

Apart from its government contract, respondent conducted no other business at the plant. However, at the direction of the government, respondent occasionally procured supplies and services for the government staff at the plant as well as for other military agencies and installations. Under the contract, respondent was not financially responsible in the event of loss, destruction or damages for any property it procured, except in the case of willful misconduct or lack of good faith by one of its major officials (Pet. App. III 24-25; Stip. pars. 25, 78-83).

As respondent incurred costs in the performance of the contract, it submitted its vouchers to the government for payment. Normally, respondent requested and received payment from the government prior to the time that it issued its own check to pay for the materials ordered. Attached to each of respondent's orders was a certificate of resale, which provided that the tangible personal property ordered would be resold, rented, leased to or attached to other tangible personal property repaired for or sold to the government (Pet. App. III 23).

As soon as the materials were accepted, they were identified whenever feasible with the label "US LSAAP," denoting United States—Lone Star Army Ammunition Plant. Article VI-B(c) of the contract provided that "title to all property furnished by the Government shall remain in the Government" and that "title to all property purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor" (Pet. App. III 24, 33; Stip. pars. 31, 54).

Petitioner assessed respondent for Texas sales taxes on its purchases of tangible personal property from private vendors which respondent transferred to the United States[4] (Pet. App. III 25-26). Respondent paid the taxes, and brought this suit for refund in the District Court of Travis County, Texas. The United States intervened because the contract required it to reimburse respondent for all costs incurred in the performance of the contract, including taxes (Stip. par. 15).

The district court held in favor of respondent and the United States and entered judgment for $112,668.42. The Court of Civil Appeals reversed. In its view, title to the property procured under the contract passed to respondent on its own account and not in its capacity as agent for the United States, nor to the United States directly, so that respondent was liable for the sales tax (Pet. App. III 21-22).

The Supreme Court of Texas reversed the Court of Civil Appeals and affirmed the judgment of the trial court (Pet. App. III 34). Although the Supreme Court of Texas concluded that respondent was not the agent of the United States and that the United States had not directly purchased the materials, it held (1) that respondent's purchases were exempt sales for resale under Articles 20.01(S) and 20.04(N) of the Texas Limited Sales, Excise and Use Tax Act, and (2) that respondent's transfers to the United States were exempt sales under the Texas Act (Pet. App. III 20-34).

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[4]Petitioner also assessed sales taxes on similar tangible personal property respondent procured from the General Services Administration. However, petitioner has conceded that portion of the assessment to be erroneous and has refunded the taxes collected on those purchases (Pet. App. III 25; Stip. pars. 2, 6).

In holding that respondent incurred no liability for Texas sales taxes either when it acquired property to be used in performance of its contract with the United States or when it transferred that property to the United States, the Supreme Court of Texas stated (Pet. App. III 33-34):

> In view of the distinct, identifiable transactions between Day and Zimmerman [respondent] and its vendor and Day and Zimmerman and the Federal Government, it is clear that the initial purchases by Day and Zimmerman were not taxable under the "Sale for Resale" exemption. Art. 20.04(O) [N] [Texas Limited Sales, Excise, and Use Tax Act]. Additionally, the second sale between Day and Zimmerman and the Federal Government is also exempt under both articles 20.04(C) [A] and (H) [F] since they are sales the State is "prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State"; and constitute "the receipts from the sale, . . . of any taxable items to, . . . [t]he United States, its unincorporated agencies and instrumentalities."

As petitioner correctly recognizes (Pet. 11-12), the decision of the Supreme Court of Texas turns entirely on a construction of the Texas Sales Tax Act. The correctness of that ruling does not warrant review by this Court, which will accept the interpretation by the highest court of the state of that state's statutes. *Gurley* v. *Rhoden*, No. 73-1734, October Term, 1974, decided May 12, 1975, slip op. 8; *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 328-330; *Maiorano* v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272; *Boston Chamber of Commerce* v.

Boston, 217 U.S. 189, 194; *Alabama* v. *King & Boozer*, 314 U.S. 1, 9-10.[5]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

CHARLES J. HLAVINKA,
Atchley, Russell, Waldrop & Hlavinka.

JULY 1975.

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[5] *Alabama* v. *King & Boozer*, 314 U.S. 1, and *Curry* v. *United States*, 314 U.S. 14, cited by petitioner (Pet. 5, 6), are distinguishable. Those cases dealt with a claim that the state statute unconstitutionally imposed a tax upon the United States. Unlike the Texas statute, the Alabama statute involved in those cases specifically made the sale of personalty to contractors the final retail sale and imposed the tax on such sale. *United States* v. *City of Detroit*, 355 U.S. 466; *United States* v. *Township of Muskegon*, 355 U.S. 484; and *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (Pet. 13-15) are similarly inapposite. They involved personal property taxes imposed upon persons in possession of tax-exempt property or who used such tax-exempt property in a business conducted for profit. *United States* v. *Boyd*, 378 U.S. 39 (Pet. 18-19), is likewise distinguishable. There, the Tennessee statute imposed a use tax on contractors when using property belonging to another party.